1992

Richard W. Von Hake, Trustee of the Von Hake 1987 Trust v. Harry Edward Thomas, aka Ed Thomas : Brief of Appellant

Utah Court of Appeals

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H. Ralph Klemm; Attorney for Plantiff.

970643 **IN THE UTAH COURT OF APPEALS**

RICHARD W. VON HAKE, TRUSTEE OF THE VON HAKE 1987 TRUST	:	**DEFENDANT\APPELLANT'S MEMORANDUM**
Plaintiff and Appellee,	:	Priority No. 15
vs.	:	
HARRY EDWARD THOMAS, aka ED THOMAS	:	Case No. 920643-CA
Defendant and Appellant.	:	

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LIST OF PARTIES

THE CAPTION OF THE CASE CONTAINS THE NAMES OF ALL PARTIES

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STATEMENT OF JURISDICTION

This court originally had jurisdiction over this matter pursuant to UTAH CODE ANNOTATED §78-2-2(3)(j)(1953 as amended).[1] The court currently has jurisdiction over this matter pursuant to a remand from Utah Supreme Court following a Petition for Writ of Certiorari having been filed by Defendant/Appellant.

NATURE OF THE PROCEEDINGS

This case is an appeal from a final order from the Sixth Judicial District Court of Kane County, State of Utah, entered by the Honorable Don V. Tibbs, on February 20, 1992. The case itself involved an attempt by the plaintiff to renew a judgement originally entered against the defendant and First National Credit Corp. on March 26, 1982. The final order of Judge Tibbs granted plaintiff's Motion for Summary Judgment, and denied a Motion for Summary Judgment made by the defendant.

In an opinion dated August 10, 1993, this court dismissed Defendant's/Appellant's appeal on the basis of his failure to serve a thirty-day jail sentence in the Kane County Jail for contempt of court.[2] This contempt of court order was issued in supplemental proceedings to the original judgment in this matter. Following the dismissal of his appeal, Defendant/Appellant filed a Petition for

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[1] Hereafter all references to the UTAH CODE ANNOTATED shall be to the 1953 as amended version.

[2] A copy of the opinion is reproduced as Addendum "A' and attached hereto.

Writ of Certiorari with the Utah Supreme Court. By Order dated 1st day of December, 1993, the Utah Supreme Court remanded the matter to this court for further briefing.[3] By order dated 7th day of January, 1994 this Court ordered the parties to brief three specific sub-issues.[4] This memorandum is submitted in response to the Court's Order

STATEMENT OF ISSUES PRESENTED AND APPROPRIATE STANDARDS OF REVIEW

This memorandum addressed three specific sub-issues which this Court has requested Defendant/Appellant to brief. These issues are issues that have not previously been addressed, and consequently any review of the issues involved is done de novo.

1. Does this Court's opinion in *D'Aston v. D'Aston*, 790 P.2d 590 (Utah App. 1990) require a thirty-day grace period for contumacious litigants?

2. If a thirty-day grace period is otherwise required, whether it may be dispensed with in situations where it is physically impossible for a defendant to bring himself in a timely compliance with a trial court's order in process, including in a situation where defendant is incarcerated out of state.

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[3] A copy of the Minute Entry is reproduced and attached hereto as Addendum "B".

[4] A copy of the Order is reproduced and attached hereto as Addendum "C".

3. If incarceration out of state might in some instance preclude dismissal and require instead a grace period longer than thirty-day, whether the results should be different in cases where defendant had amply opportunity, pre-incarceration, to discharge the contempt sanction pending against him.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The determinative statutes and rules in this case are reproduced here in as Addendum "D".

STATEMENT OF THE CASE

This case arises out of an attempt by the Plaintiff to renew a judgment entered jointly and severally, against Mr. Thomas and First National Credit Corp., on March 26, 1982. The complaint in this case was filed on December 31, 1990.

After having unsuccessfully attempted to have the Defendant, Mr. Thomas, personally served at his home in Wyoming, the Plaintiff moved the Court ex parte for an order permitting service by publication. That order was granted by the court, and service was effected thereby.

Mr. Thomas appeared specially by way of a motion to quash the service by publication. That motion was denied, and Mr. Thomas subsequently filed his answer. After filing his answer, Mr. Thomas moved to dismiss the complaint based on the statute of limitations,

release under the Joint Obligors Act, lack of jurisdiction, and failure to mitigate damages. This motion to dismiss was denied.

Mr. Thomas made a petition for interlocutory appeal of the Trial Court's refusal to grant the motion to dismiss, but the Supreme Court refused to grant the petition. The Plaintiff brought a motion for summary judgment. Mr. Thomas replied and filed a cross-motion for summary judgment. After oral argument, on the date scheduled for trial, the Trial Court denied Mr. Thomas' motion for summary judgment, and granted summary judgment to the Plaintiff.

This case is an appeal from the court's final order granting Plaintiff's summary judgment, and denying summary judgment to Mr. Thomas.

Mr. Thomas made a timely appeal to the Utah Supreme Court pursuant to UTAH CODE ANN. §78-2-2(3)(j). Notice of Appeal was filed March 2, 1992. The Utah Supreme Court, on September 30, 1992 poured the matter over to the Court of Appeals for disposition. On March 10, 1993, a notice of oral argument was sent to respective counsel setting oral argument for June 24, 1993 at 1:30 p.m. On June 15, 1993, the court entered an order requiring the parties' submit simultaneous memoranda advising the court of facts relevant to a prior contempt order issued against Mr. Thomas "and explaining

why the appeal should or should not be stayed." Respective counsel filed the memoranda as required.

On June 24, 1993, oral argument was had before this Court with a portion of that argument, at the Court's direction, being addressed to the issue of why the matter should not be stayed. On June 10, 1993, this Court filed an opinion wherein Mr. Thomas' appeal was dismissed.

Defendant/Appellant filed a Petition for Writ of Certiorari with the Utah Supreme Court requesting a review of this Court's decision. By Order dated 1st day of December, 1993, this matter was remanded to the Utah Court of Appeals for further briefing on the issue of whether Mr. Thomas' failure to serve his sentence should result in a dismissal of his appeal.

STATEMENT OF FACTS

1. The Defendant, Harry Edward Thomas ("Mr. Thomas") is, and has been since 1966, a legal resident of the state of Wyoming. R. 203.

2. Mr. Thomas has maintained his exclusive residence in the state of Wyoming since 1984. R. 155; R. 116.

3. Plaintiff, Richard W. Von Hake as trustee of the Von Hake 1987 Trust, is a resident of the state of Nevada. R. 128-135.

4. The Von Hake 1987 Trust is a Nevada trust. R. 132-135.

5. The sole purported basis for "standing" of the Plaintiff to bring this action are the duly executed documents of the Von Hake 1987 Trust together with their attachments and schedules. R. 128-129.

6. This case arises out of an attempt by the Plaintiff to renew a judgment entered jointly and severally against Mr. Thomas and First National Credit Corp. ("First National") on March 26, 1982. R. 209.

7. Plaintiff in the above-referenced case was Richard A. Von Hake, who was the grantor of the Von Hake 1987 Trust. R.129.

8. Shortly after the judgment was entered, First National filed for protection under Chapter 11 of the United States Bankruptcy Code in the United States District Court for the District of Utah. R.209.

9. The judgment entered against Mr. Thomas and First National was in the sum of $987,445.50 plus post-judgment interest. R.209.

10. Approximately 18 months after the entry of judgment, Von Hake commenced supplemental proceedings to discovery the where-abouts of Thomas' assets. Opinion Pages 1-2.

11. During the course of the proceedings, the trial court entered both civil and criminal contempt orders for failure to

provide certain tax returns and to appear before the court as ordered.[5]

12. Thomas appealed the judgments of contempt, and on appeal the Utah Supreme Court struck down the civil contempt but affirmed the criminal contempt, order of the trial court. *Von Hake vs. Thomas,* 759 P.2d 1162 (Utah 1988).

13. Mr. Thomas has never served the thirty (30) days in the Kane County Jail. Opinion Page 2.

14. The complaint which forms the basis of this current action was filed on December 31, 1990. R.1.

15. No actual physical service of process was made on Mr. Thomas in this action but service was made by publication pursuant to an order of the trial court dated February 27, 1991. R. 17-18.

16. Mr. Thomas sought to have said service quashed, but his motion to quash was denied by the trial court. R. 28-29; R. 45-46.

17. Trial was originally scheduled on the renewal of judgment in February of 1992. Prior to the beginning of trial, the court took argument on the parties' cross-motions for summary judgment. Thereafter the trial court granted summary judgment to the Plaintiff/Appellee, Richard Von Hake, Trustee of the Von Hake 1987 Trust. R. 208-214.

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[5]A detailed description of the events leading to the trial court's decision holding Thomas in contempt of court can be found in Von Hake vs. Thomas, 759 P.2d 1162, 1164-66 (Utah 1988).

18. On March 2, 1992, Defendant/Appellant Edward Thomas filed a notice of appeal. R.219.

19. The appeal was originally taken to the Utah Supreme Court, but was poured over to the Court of Appeals.

20. On June 15, 1993, the parties were ordered to brief the issue of why Mr. Thomas' appeal should not be stayed due to his failure to satisfy the prior contempt order issued by Judge Tibbs. Order of June 15, 1993.

21. On August 10, 1993, this Court issued an opinion dismissing Mr. Thomas' appeal. Addendum "A".

22. On the 2nd day of December, 1993, the Utah Supreme Court issued a Minute Entry remanding this case back the to Utah Court of Appeals for further briefing. Addendum "B".

23. On the 7th day of January, 1994 this Court ordered the parties to brief three specific issues. Addendum "C".

SUMMARY OF THE ARGUMENT

This matter is back before the court for a determination of whether or not it is appropriate to dismiss Mr. Thomas' appeal on the basis of his being a contumacious litigant. As will be shown in detail in the brief below, a dismissal is not appropriate in this case for a number of reasons.

First, dismissal is not appropriate because this Court's ruling in *D'Aston v.D'Aston* requires a grace period before

dismissal of an appeal wherein a contumacious litigant may come into compliance with the trial court's orders. No such grace period was available in this case, and indeed parties for both counsel indicated to the court that neither appellant or appellee were in favor of a stay.

The reason for the requirement of the time period to come into compliance with the trial court's order is that the Utah Constitution guarantees an individual an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause. Dismissal of Mr. Thomas' appeal denies him this right. This is not to say that appellate courts do not have the ability to dismiss the appeals of contumacious appellants who refuse to comply with the appellate court's orders. It is rather to say that an individual before having his appeal dismissed must have an opportunity to obey the appellate court's order prior to dismissal being appropriate.

The next issue before this court is whether the dismissal of an appeal is appropriate where it is physically impossible for an appellant to bring himself into timely compliance with a trial court's order. Previous decisions by the Utah Supreme Court, dealing with the issue of the service of jail time in contempt situations clearly hold that the defense of impossibility of performance <u>as of the time the sanction is to be imposed</u> is always

available. Since the time for measuring whether the impossibility exists is the time that the sanction is to be imposed, the defense of impossibility would be available to Mr. Thomas in this case.

This court sua sponte raised the issue of Mr. Thomas' previous contempt at a period of time after his incarceration in Boron California. From that time to the present, it has been outside of Mr. Thomas' control to comply with the trial court's order that he serve thirty-days in the Kane County Jail.

The final issue which this court requested be addressed is, whether the fact that Mr. Thomas had a prior ability to comply with the court order and failed to do so invalidates a later defense of impossibility. The answer to this question is again clearly no. Because the time for the determination of the validity of the defense of impossibility is at the time the sanction is to be entered, an individual's prior ability to comply or prior actions are irrelevant. *Bradshaw v. Kershaw,* 627 P.2d 528, 531 (Utah 1981).

Because Mr. Thomas had no present ability to perform at the time this court sought to enter its sanction of dismissal of his appeal, dismissal would not be an appropriate remedy in this case. Wherefore the Defendant/Appellant respectfully requests this court rescind its previous order of dismissal and address this case on its merits.

ARGUMENT

I. UNDER ALL THE CIRCUMSTANCES OF THIS CASE, DISMISSAL IS NOT AN APPROPRIATE SANCTION.

A. *D'Aston* Requires a Thirty (30) Day Grace Period For Contumacious Litigants.

D'Aston v. D'Aston, 790 P.2d 590 (Utah App. 1990) was the first Utah Appellate Court case to address the issue of whether an appellate court may dismiss a civil appeal when the appellant is in contempt of a trial court order in the same action. *D'Aston* at 593.

After consideration of Utah Constitutional Law, Utah Criminal Law, and a review of the law from other jurisdictions, this Court held that under certain circumstances, a party held in contempt by a lower court could have his or her appeal stayed until the appellant has submitted to the process of the trial court. *D'Aston* at 595. This Court further indicated that failure to obey the Appellate Court's Order could result in the dismissal of the appeal. *D'Aston* at 595.

In the *D'Aston* decision this Court detailed its methodology in coming to the conclusion and holding in the case. That methodology included a review of the law of other jurisdictions across the country who had addressed similar issues. This Court found some jurisdictions which dismissed the civil appeals of contumacious parties without allowing the parties an opportunity to bring

themselves into compliance with the trial court's order. It found some jurisdictions that have allowed the party time to comply with the trial court's order before dismissing the appeal, and the court found still a third group whose approach was to stay the appeal until the appellant has submitted to the process of the trial court. *D'Aston* at 593. After reviewing the three positions this Court held:

> We are persuaded that the *Closset* approach is most consistent with the Utah Supreme Court's *Tuttle* decision and the United States Supreme Court's *Arnold* decision. By adopting this approach we do not deny Appellant her right to an appeal under Utah Constitution Article VIII, §5, but rather insist that she must submit herself to the jurisdiction of the trial court and satisfy that court's concerns before she may exercise that right.

D'Aston at 594.

The *Closset* decision referred to in the previous quote is the case of *Closset v. Closset*, 71 Nevada 80, 280 P.2d 290, 292 (1955). This case is one cited for the third proposition that the court should stay the appeal until the Appellant has submitted to process of the trial court.

This Court correctly reasoned that this third approach is most in line with the only prior related Utah court decisions and is further the only approach in line with the provisions of the Utah State Constitution.

This Courts analysis of the *Tuttle* case is particularly enlightening. In *D'Aston* this Court stated:

> Likewise, Utah's appellate courts have not considered whether they may dismiss a civil appeal when the appellant is in contempt of a trial court order in the same action. However, in the area of criminal appeals, the Utah Supreme Court has dismissed the appeal of a prisoner after he escaped custody. *State v. Tuttle*, 713 P.2d 703, 704 (Utah 1985); See also *Hardy v. Morris*, 636 P.2d 473, 474 (Utah 1981) (Court dismissed an escapees appeal from a dismissal of a writ of habeas corpus). In *Tuttle*, the Utah Supreme Court defined its position in *Hardy*. The Court held that an appellant prisoner's escape is not an abandonment of his right to an appeal and that the dismissal of his appeal is not an appropriate punishment for his escape. Tuttle, 713 P.2d at 704-05.

D'Aston at 593. (Emphasis added).

Article VIII, §5 of the Utah Constitution guarantees an individual "an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause".

There is no allegation that this Court lacks jurisdiction over the cause. The constitutional provision is clear on its face. It affords Mr. Thomas the right to appeal the erroneous decision of the Sixth District Court. Dismissal of this appeal, without addressing the merits of the issues involved would be a denial of that constitutional right.

This is not to say, however that the appellate courts are without power to dismiss appeals where appellants are in contempt or disobedience of the appellate court's orders. It does require, however there be some form of due process afforded an appellant before a right can be taken from him. Such due process should

comprise the type of conditions recognized by this Court in *D'Aston* and, as cited with approval by this Court, by the Nevada Supreme Court, in *Closset*. This requirement is that there be an order from the Appellate Court requiring some sort of action on the part of the Appellant and an opportunity to comply with the Appellate Court's Order.

B. Dismissal Of The Appeal Is Not Appropriate Where It Is Physically Impossible For An Appellant To Bring Himself Into Timely Compliance With The Trial Court's Orders And Process.

The Appellant in this case is currently incarcerated in the federal penitentiary in Boron, California. He was so incarcerated at the time the issue of his non-compliance was raised by this Court. The second sub issue to which counsel were directed to address their argument in the January 7, 1994 Order is:

> If a thirty (30) day grace period is otherwise required, whether it may be dispensed with in situations where it is physically impossible for Defendant to bring himself into timely compliance with the trial court's orders and process, including in the situation of Defendant's incarceration out of state.

Appellant would urge the court to re-define this issue. The issue is not can the Court do away with the required compliance, but whether it is appropriate to dismiss an appeal where an appellant is physically incapable of coming into compliance with the orders of the trial court. This very issue was addressed by the Utah Supreme Court in the case of *Bradshaw v. Kershaw,* 627 P.2d 528 (Utah 1981). In *Bradshaw*, the Utah Supreme Court held:

> When the proposed sanction is coercive imprisonment, the defense of impossibility of performance as of the time the sanction is to be imposed would always be available without regard to how or by whom the condition of impossibility occurred. It is obviously repugnant to reason and futile to try to coerce an act that the contemnor has no present ability to perform. . . Consequently, the defense of impossibility is uniformly held available to this type of sanction. In fact, the sanction cannot be imposed without an affirmative finding of present ability to comply.

Bradshaw at 531 (Emphasis added).

D'Aston did not involve a threat of dismissal for failure to obey the trial court's orders, it involved a threat of dismissal upon failure to conform with an order of this Court. However, as the Supreme Court stated in *Bradshaw* it is "repugnant" to establish an order knowing that a party physically cannot comply with that order. Accordingly, the question is not can the conformity be waived, but can the appeal be dismissed, and the answer must be no.

In the case where an individual against whom the appeal is sought to be dismissed is incarcerated, additional constitutional considerations come into play. Article I §9 of the Utah Constitution provides "excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor."

Dismissal of Mr. Thomas' complaint violates this constitutional provision in two ways. First, the decision to refuse to hear

his appeal is in effect, an affirmance of the wrongful decision of the trial court. Effectively, this amounts to a fine in excess of One Million Dollars.

It is Mr. Thomas' contention that the trial court's ruling, which imposed a judgment in an amount in excess of One Million Dollars is improper as a matter of law. If Mr. Thomas is correct, the debt of One Million Dollars against him should no longer exist. By denying his right of appeal, this Court effectively strikes Mr. Thomas' right of statute of limitations, his challenge that Plaintiff is not the real party in interest, together with all other issues raised in his appeal. The result of the decision is no different than if the Court were fining Mr. Thomas over One Million Dollars. Clearly it is not contemplated within the contempt statutes that a person can be fined in excess of One Million Dollars for the type of contempt charged here.

Dismissal of Mr. Thomas' appeal also constitutes treatment with unnecessary rigor of an individual who is in prison. Appellant believes, *D'Aston* stands for the principal that a grace period needs be granted a contumacious litigant, to come in compliance with the trial court's orders, before dismissal is appropriate. Mr. Thomas would have received such an opportunity in this case had he not been in prison. Indeed, the original issue raised to this Court was whether this matter should be stayed in accor-

dance with this Court's prior decision in *D'Aston*. The refusal to allow Mr. Thomas to appeal is therefore a determination by the Court that because Mr. Thomas is in prison, the Court may dismiss his appeal inflicting on him a wrongful judgment in excess of One Million Dollars.

Such treatment strikes at the fundamental right to equal protection guaranteed under both the United States and Utah Constitutions. Such disparate treatment also clearly violates Article I §9 and should therefore not be sanctioned.

C. Does an appellant's prior ability to comply with the trial court's orders invalidate a later defense of impossibility?

The third issue which this Court requested counsel address is:

> If incarceration out of state might in some instances preclude dismissal and require instead a grace period longer than thirty (30) days, whether the results should be different in cases where Defendant had ample opportunity, pre-incarceration, to discharge the contempt sanction pending against him.

The contempt order at issue in this case is a matter of criminal contempt which required Mr. Thomas to spend thirty (30) days in the Kane County Jail. Since April 12, 1993, Mr. Thomas has been incarcerated in the federal penitentiary in Boron, California. Mr. Thomas' current incarceration makes it physically impossible for him to comply with the order of the trial court that Mr. Thomas spend thirty (30) days in the Kane County Jail. It is undisputable however, that at some time prior to his entry into the Kane County

Jail, Mr. Thomas could have and should have, reported to the Kane County Jail and served his thirty (30) day sentence. The ability of Mr. Thomas to have previously complied with the order of the trial court is however, irrelevant to the issue of whether the Court of Appeals can or should dismiss Appellant's appeal.

A dismissal of Mr. Thomas' appeal is a denial of his rights to an appeal. "The right to an appeal is a valuable constitutional right and ought not to be denied except where the right has been lost or abandoned." *Adamson v. Brockbank,* 185 P.2d 264, 268 (Utah 1947). Where a party does not know that he or she is forfeiting that right, the right to an appeal should not be taken from them, without providing some sort of an opportunity for compliance. It has long been recognized in this the State, that the defense of impossibility of performance is a sufficient defense to a continuing charge of contempt. For example, in the case of *Jeppson v. Jeppson,* 597 P.2d 1345 (Utah 1979), the Utah Supreme Court held that a future contempt of court cannot be punished without a hearing to determine whether performance is protected by the doctrine of impossibility.

In *Jeppson,* the trial court had adjudicated a husband in contempt of court for failure to pay his prior alimony and support obligations. The trial court sentenced the husband to serve 15 days in jail, but suspended the sentence on the basis of prompt

payment of the Defendant of future alimony and support obligations. The trial court ordered that any future delinquencies would result in an immediate institution of the sentence without hearing. On appeal, the Utah Supreme Court stated:

> The finding of contempt would not lie if one . . . puts forth every reasonable effort to comply with the court's order and still wasn't able to do so. . ."

Jeppson at 1345.

In this instance, the future punishment this Court seeks to impose is the dismissal of Mr. Thomas' appeal. It is undisputed that Mr. Thomas is currently unable to comply with the contempt order. Mr. Thomas' previous ability is not, a determining factor. The issue is whether Mr. Thomas can comply now when this Court seeks to impose an additional sanction. This exact issue was addressed in *Bradshaw v. Kershaw,* 627 P.2d 528 (Utah 1981).

In *Bradshaw,* the Supreme Court clearly stated that the time to determine whether the impossibility of performance exists is at the time that the sanction is to be imposed. The Court held ". . . the defense of impossibility of performance as of the time the sanction is to be imposed would always be available, without regard to how or by whom the condition of impossibility occurred." *Bradshaw* at 531.

As the Supreme Court clearly stated in *Bradshaw,* the defense of impossibility is available to Mr. Thomas with respect to the

sanction of dismissal of his appeal by this Court. Consequently, this Court should not dismiss Mr. Thomas' appeal in this matter.

CONCLUSION

A dismissal of Mr. Thomas' appeal in this matter would result in a violation of his constitutional rights. The sanction of dismissal of an appeal is not appropriate without giving an individual an opportunity to remedy the condition underlying the need for the dismissal. Where it is physically impossible for an individual to correct such deficiencies, irrespective of how that impossibility arose, a sanction should not be imposed.

Both parties in this matter have agreed that if dismissal is not appropriate, they would prefer to have this Court address the merits of the appeal at this time, rather than deferring a ruling of the appeal until after Mr. Thomas has been released from the federal prison and served sentence in the Kane County Jail. Where the effect of the stay is to punish not only Mr. Thomas but the Appellee as well, such a result would not be appropriate. Therefore, the Defendant/Appellant would respectfully request that this Court reverse its prior dismissal and address the merits of the appeal which is before it.

DATED this 11 day of February, 1994.

BROWN, LARSON, JENKINS & HALLIDAY

by _____
Shawn D. Turner

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 1994, I mailed, postage prepaid, a copy of the foregoing document to the following:

H. Ralph Klemm
349 South 200 East, #560
Salt Lake City, Utah 84111

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ADDENDUM "A"

IN THE UTAH COURT OF APPEALS

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Richard W. Von Hake, Trustee of the Von Hake 1987 Trust, Plaintiff and Appellee, v. Harry Edward Thomas, Defendant and Appellant.	OPINION (For Publication) Case No. 920643-CA F I L E D (August 10, 1993)

Sixth District, Kane County
The Honorable Don V. Tibbs

Attorneys: Shawn D. Turner, Salt Lake City, for Appellant
H. Ralph Klemm, Salt Lake City, for Appellee

Before Judges Billings, Garff, and Orme.

ORME, Judge:

Defendant, Harry Edward Thomas, appeals the summary judgment entered against him in plaintiff's action to renew a judgment. Due to defendant's long-standing status as a contemnor of the trial court, we refuse to consider the merits of his appeal and instead dismiss it.

FACTS

As this case has a long and arduous history, we only discuss facts pertinent to our disposition, and not those of the underlying dispute or the myriad of arguments Thomas raises in the instant appeal.

In an earlier round of this litigation, appellee's father and predecessor in interest, Richard A. Von Hake, obtained a substantial judgment for fraud against Thomas. The Utah Supreme Court affirmed that judgment in Von Hake v. Thomas, 705 P.2d 766 (Utah 1985) (Von Hake I). Eighteen months later, because Thomas had failed to make payments on the judgment, Von Hake commenced

supplemental proceedings to discover the whereabouts and extent of Thomas's assets.

During the course of protracted supplemental proceedings, the trial court found that Thomas had not complied with its order for production and had used improper and dilatory tactics to frustrate its orders and to avoid appearing in court. Accordingly, the court found Thomas in contempt, sentenced him to thirty days in jail, and ordered the issuance of an arrest warrant.[1]

The court entered a formal order of commitment stating that Thomas was guilty of contempt for failing to produce various documents and for failing to appear before the court as ordered. The Utah Supreme Court stayed execution of the sentence pending appeal.

On appeal, the Court, inter alia, affirmed Thomas's criminal contempt conviction. Von Hake v. Thomas, 759 P.2d 1162, 1173 (Utah 1988) (Von Hake II). The Court released the stay of execution and remanded the matter to the trial court for a single purpose: "execution of the thirty-day sentence." Id.

Thomas is now appealing the summary judgment entered against him in a proceeding to renew the very judgment affirmed in Von Hake I and out of which the contempt determination arose.[2] Nonetheless, to this very day, Thomas has not served the thirty-day contempt sentence upheld in Von Hake II. Upon learning of this state of affairs in the course of reviewing the briefs, we requested that both parties file supplemental memoranda addressed to the effects of Thomas's outstanding contempt on his present appeal in light of our decision in D'Aston v. D'Aston, 790 P.2d 590 (Utah App. 1990). In his memorandum, Thomas disclosed he was incarcerated on April 12, 1993, in the Federal Penitentiary in Boron, California, where he is serving a five-year sentence for tax fraud.

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1. A detailed description of the events leading to the trial court's decision holding Thomas in contempt of court can be found in Von Hake v. Thomas, 759 P.2d 1162, 1164-66 (Utah 1988).

2. We note that the appellee in the instant action is not the original plaintiff. Richard A. Von Hake was the original plaintiff in Von Hake I but upon his death, appellee became trustee of the Von Hake 1987 Trust and is suing to renew the original judgment in that capacity.

D'ASTON

D'Aston presented this court--coincidentally, this very panel--with its first opportunity to determine whether Utah appellate courts "may dismiss a civil appeal when the appellant is in contempt of a trial court order in the same action." D'Aston v. D'Aston, 790 P.2d 590, 593 (Utah App. 1990) (emphasis added). In D'Aston, the trial court held the appellant in contempt of court because she was "purposely hiding herself from the jurisdiction of the Court and from service." Id. at 592. Accordingly, the trial court entered a formal order of commitment and issued a bench warrant for appellant's arrest. Subsequently, appellant filed an appeal from the divorce decree entered by the trial court. We held that the appeal would be dismissed in thirty days if within that time appellant did not bring herself within the process of the trial court. Id. at 595. In so doing, we stressed that appellant was not being denied her right to an appeal under Article VIII, section 5 of the Utah Constitution, but instead was merely being required to submit herself to the lawful process of the trial court and to satisfy that court's concerns as a prerequisite to exercising her right to an appeal. Id. at 594.

CONTEMPT

In his memorandum, Thomas urges this court not to dismiss his appeal on two grounds, both of which focus on the alleged inapplicability of D'Aston to the instant matter.[3] First, Thomas

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3. An additional concern surfaced at oral argument, namely that our record does not establish that Thomas ever actually received notice of the Utah Supreme Court's decision affirming the criminal contempt determination. Any concern regarding Thomas's awareness of the Court's decision and consequently his need to submit himself to the trial court is allayed by our reasoning in D'Aston v. D'Aston, 790 P.2d 590 (Utah App. 1990). In D'Aston, we stated that where the party has initially been served in a case and is represented by counsel, service on the party's attorney of an order to show cause why the party should not be held in contempt is sufficient. 790 P.2d at 592. Moreover, we recognized that even if an attorney is unaware of the whereabouts of his or her client and is only authorized to represent the client on appeal, service on the attorney alone is adequate to sustain a contempt order entered against the client. D'Aston, 790 P.2d at 592-93. We believe this reasoning reflects the simple proposition that an attorney is the agent of the client and knowledge of any material fact possessed by the attorney is

(continued...)

asserts that this case is different from D'Aston because unlike D'Aston, in which the contempt occurred in the very action from which the appeal was taken, albeit for failure to comply with post-judgment directives of the court, the appeal here is arguably in an action different from the one in which the contempt occurred, namely a subsequent action to renew the judgment entered in the case out of which the contempt arose. Second, Thomas claims that his circumstances are unlike those present in D'Aston because in D'Aston there was no discernible obstacle preventing the appellant from complying with the trial court's order, whereas, in the present case, Thomas's incarceration makes it physically impossible for him to submit himself to the trial court within thirty days. Thus, Thomas concludes that because a dismissal conditioned on submitting himself to the district court would necessarily be fruitless, we cannot dismiss his appeal.

We disagree that these arguable distinctions take the instant matter out of the compass of the D'Aston rule. Thomas convinces us that conditioning dismissal on his appearance within thirty days would be fruitless; he does not convince us that he should be spared the dismissal of his appeal.

A. Action to Renew Judgment

Thomas first argues that an action to renew a judgment is an action separate from the action out of which the judgment arose.

In D'Aston, this court's decision dealt with the limited situation in which the appellant was in contempt of a trial

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3. (...continued)
imputed to the client. Runge v. Fox, 796 P.2d 1143, 1147 (N.M. App. 1990). See Alexander v. Russo, 571 P.2d 350, 358 (Kan. App. 1977); Lange v. Hickman, 544 P.2d 1208, 1209 (Nev. 1976); Mahoney v. Linder, 514 P.2d 901, 904 (Or. App. 1973); Haller v. Wallis, 573 P.2d 1302, 1307 (Wash. 1978) (en banc).

We see no reason why a different rule should apply to the present situation. As Thomas was represented by counsel on his appeal of the contempt order, and no claim has been raised that his counsel was unaware of the Court's decision or the need for Thomas to submit himself to the trial court (an untenable proposition since copies of Supreme Court decisions are routinely sent to the attorneys of record in the action and, in the unlikely event of misdelivery, counsel would have seen the published decision anyway in the course of reviewing the advance sheets), we hold that Thomas is properly chargeable with knowledge of the decision and consequently of his obligation to serve his outstanding sentence.

court's order issued in the same action. 790 P.2d at 593. Indeed, some jurisdictions limit the authority of courts to dismiss a contemnor's appeal to just such circumstances. See Bonn v. Bonn, 529 P.2d 851, 854 (Wash. App. 1974) (holding that a contemnor has access to the courts to present a new and independent matter).

However, the majority rule expands this doctrine somewhat and also allows dismissal of a contemnor's appeal if the contempt arose in a collateral proceeding. In Steed v. Woods, 475 S.W.2d 814 (Tex. App. 1972), for example, the court stated that it was

> convinced that the better reasoning supports the majority rule that an appellate court, in the absence of a constitutional or statutory prohibition, is vested with the implied power to deny the assistance of its processes to an appellant who persists in contumaciously defying either the order attempted to be appealed from or a collateral order emanating from the same cause of action.

Id. at 816 (emphasis added). In Woods, the court held that where the appellant stood in contempt of a prior custody order entered in a divorce action, her appeal from a subsequent community property division award, arising out of the same divorce proceeding, would be dismissed. Id. at 817.

Thomas urges this court to consider a renewal proceeding a separate action because it is commenced by the filing of a new complaint and summons. See Utah R. Civ. P. 3(a). We refuse to do so. It is clear in the instant case that the renewal judgment appealed from arises, ultimately, from the same cause of action that culminated in the original judgment. Thus, we could consider the renewal action a collateral proceeding and dismiss Thomas's appeal under the Woods rationale. However, we believe the better line of reasoning, which is followed by Utah and the majority of American jurisdictions, treats a renewal action as simply a continuation of the original proceeding.

Under Utah law, "[a] renewal is not an attempt to enforce, collect, or expand the original judgment." Barber v. Emporium Partnership, 800 P.2d 795, 797 (Utah 1990) (holding that an action to renew a judgment against a debtor does not violate the automatic stay provisions of the Bankruptcy Code). Instead, in seeking to renew a judgment, a party is "only trying to maintain the status quo by preventing the judgment's lapse under the statute of limitations." Id. Accordingly, Utah law treats a renewal action, at least in other contexts, as merely a

continuation of the original proceeding and not as a new and independent action.

The adherence of American jurisdictions to this position is unmistakable in cases dealing with questions of in personam jurisdiction. See, e.g., Bank of Edwardsville v. Raffaelle, 45 N.E.2d 651, 653 (Ill. 1942) (action to renew a money judgment is not a new suit but a continuation of the old one); Bahan v. Youngstown Sheet & Tube Co., 191 So. 2d 668, 670 (La. App. 1966) (proceeding to revive a money judgment entered against a nonresident judgment debtor is not a new action but is only a proceeding to continue the original action); State v. Kirkwood, 239 S.W.2d 332, 334 (Mo. 1951) (en banc) (action to revive a divorce is not a new action but is merely a continuation of and supplementary to the original proceeding); Kronstadt v. Kronstadt, 570 A.2d 485, 487-88 (N.J. Super. Ct. App. Div. 1990) (process to revive a judgment for support arrearages and partial property settlement is simply a continuation of the original action); Berly v. Sias, 255 S.W.2d 505, 508 (Tex. 1953) (action to renew a money judgment is not an independent suit but merely a continuation of the original suit); Duffy v. Hartsock, 46 S.E.2d 570, 574 (Va. 1948) (proceeding to revive a judgment lien against real estate is to be treated as a continuation of the original suit). Likewise, the connection between the original action and the renewal action in the instant case is simply too close to ignore merely because a new complaint is filed and a new civil number assigned to the renewal action.

It is immaterial whether we designate a renewal proceeding as a continuation of the original proceeding or as a collateral order. See Woods, 475 S.W.2d at 816. Either characterization yields the same result: the D'Aston rule is applicable.

B. Present Inability to Discharge Contempt

Thomas's second assertion is that D'Aston is inapplicable because even if he now wanted to submit himself to the trial court, he cannot do so as a result of his incarceration, whereas in D'Aston, there was no impediment to compliance other than the appellant's own refusal to do so.[4]

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4. In making this argument, Thomas chooses to overlook that for over five years there was no impediment to his bringing himself into compliance with the lawful process of this state's judiciary other than his own refusal to do so. His incarceration in California is an excellent reason for not appearing at the Kane County Jail, toilet kit in hand, to discharge his obligation. The argument borders on the disingenuous, however, for the simple

(continued...)

Utah case law recognizes the general rule that "a party who is in contempt will not be heard by the court when he wishes to make a motion or [be] grant[ed] a favor." Baker v. Baker, 224 P.2d 192, 194 (Utah 1950). Accord Johnson v. Johnson, 560 P.2d 1132, 1134 (Utah 1977). Nonetheless, Utah has chosen to follow a majority of jurisdictions in allowing the contemnor time to comply with the trial court's order before dismissing the appeal. D'Aston v. D'Aston, 790 P.2d 590, 593-95 (Utah App. 1990) (30 days to comply) (citing Stewart v. Stewart, 372 P.2d 697, 700 (Ariz. 1962) (en banc) (30 days to comply); Tobin v. Casaus, 275 P.2d 792, 795 (Cal. Dist. Ct. App. 1954) (30 days to comply); Greenwood v. Greenwood, 464 A.2d 771, 774 (Conn. 1983) (30 days to comply); Pasin v. Pasin, 517 So. 2d 742, 742 (Fla. Dist. Ct. App. 1987) (15 days to comply); In re Marriage of Marks, 420 N.E.2d 1184, 1187 (Ill. App. 1981) (30 days to comply); Henderson v. Henderson, 107 N.E.2d 773, 774 (Mass. 1952) (30 days to comply); Prevenas v. Prevenas, 227 N.W.2d 29, 30 (Neb. 1975) (20 days to comply); Hemenway v. Hemenway, 339 A.2d 247, 250 (R.I. 1975) (30 days to comply); Strange v. Strange, 464 S.W.2d 216, 219 (Tex. Civ. App. 1970) (per curiam) (10 days to comply); Pike v. Pike, 167 P.2d 401, 404 (Wash. 1946) (10 days to comply)). A court's rationale in dismissing an appeal if the contempt persists beyond the grace period is that it would be a flagrant abuse of the principles of equity and the due administration of justice to allow a party who flaunts court orders to seek judicial aid. D'Aston, 790 P.2d at 593.

In D'Aston, we recognized that the appellant was not claiming that she was unable to comply with the trial court's order, id. at 594, as Thomas is claiming here. While it is generally true that an individual should not be penalized for circumstances beyond one's control, see Stewart, 372 P.2d at 700, this is not Thomas's situation. Although Thomas may have a valid excuse for not complying with the trial court's order since April 12, 1993, while he has been incarcerated, Thomas has no excuse for his failure to submit himself during the entire five years preceding his out-of-state incarceration. All parties to this appeal agree that a provisional dismissal, conditioned upon Thomas's failure to physically present himself to the trial court within thirty days, would be an exercise in futility. From this common ground, the parties quickly diverge. Thomas argues that

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4. (...continued)
reason that this excuse has been available to Thomas only since April 12, 1993. Notwithstanding his difficulties with the federal government, there was ample opportunity for Thomas, in the half decade preceding his imprisonment on federal charges, to make his peace with the Sixth District Court if he had any sincere desire to do so.

D'Aston cannot be applied and his appeal cannot be dismissed. Appellee urges that the futility of a thirty-day grace period dictates an outright dismissal.

Applying the sound rule of D'Aston, we agree with appellee and dispense with the formality of a thirty-day grace period because Thomas concedes he cannot possibly avail himself of it.

SUA SPONTE DISMISSAL

Although neither party questioned the power of this court to dismiss Thomas's appeal sua sponte,[5] we pause to give a brief summary of the firm legal basis for our action. While Utah's appellate courts have not considered whether they may dismiss a civil appeal sua sponte when the appellant is in contempt of a trial court order, other jurisdictions have recognized that appellate courts are entitled to dismiss the appeals of contemnors sua sponte.

In Greenwood v. Greenwood, 464 A.2d 771 (Conn. 1983), the Supreme Court of Connecticut held that it would dismiss plaintiff's appeal, sua sponte, if the plaintiff did not comply with the trial court's orders within thirty days. Id. at 774. In so doing, the court noted the broad discretion vested in the courts when deciding whether contemptuous conduct warrants dismissal of an appeal. Id. at 773. The court stated that "[a]lthough the defendant never made a motion to dismiss the appeal, this court is not limited in its disposition of a case to claims raised by the parties and has frequently acted sua sponte upon grounds of which the parties were not previously apprised." Id. Moreover, the court noted the plaintiff was not prejudiced by its action because the conditional nature of the dismissal provided plaintiff with a reasonable opportunity to save her appeal by submitting herself to the trial court.[6] Id. at 773-74. See 17 Am. Jur. 2d, Contempt § 226 (1990) (appellate court, in the exercise of its inherent authority, may decline to entertain

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5. In D'Aston, appellee had affirmatively moved for dismissal in view of appellant's contempt. 790 P.2d at 591.

6. This same line of reasoning has been followed in appellate court decisions affirming a trial court's sua sponte dismissal of a contemnor's action. See Hahn v. Hahn, 144 N.E.2d 499, 501 (Ohio App. 1956) (affirming the trial court's sua sponte dismissal of a contemnor's motion for a change of custody). See also Botany v. Heeringa, 521 F. Supp. 1369, 1369-70 (E.D. Wis. 1981) (dismissing plaintiff's civil action sua sponte and with prejudice due to plaintiff's criminal contempt conviction).

an appeal by a litigant who stands in contempt in the proceedings sought to be appealed). See also Steed v. Woods, 475 S.W.2d 814, 816-17 (Tex. App. 1972) (appellate court may deny review to a contumacious appellant in the exercise of the appellate court's implied power to use its processes to induce compliance with a related order) (relying on National Union of Marine Cooks and Stewards v. Arnold, 348 U.S. 37, 75 S. Ct. 92 (1954)); State v. Common Pleas Court of Lorain County, 235 N.E.2d 232, 235 (Ohio 1968) (within inherent powers of court to deny judicial assistance to litigant who refuses to comply with court orders).

The rationale behind allowing a court the discretion to dismiss a contemnor's appeal stems from the

> rash of modern instances where court orders are disobeyed with impunity and respect for the law and the courts [is] thereby weakened. It seems, therefore, that it is the duty of the appellate courts to see to it that every assistance is extended to the courts of the [state] so that orders are meticulously carried out as otherwise the dignity of the judiciary, the majesty of the law and its enforcement are clearly undermined.

Commonwealth v. Beemer, 188 A.2d 475, 476 (Pa. Super. Ct. 1962). Although Beemer did not present a situation where the court was acting sua sponte, the court's reasoning applies with equal force to a sua sponte dismissal. Given the duty of the appellate courts to protect the integrity of the judiciary, it would be bizarre if our ability to do so were severely restricted by a requirement that we could only dismiss a contemnor's appeal if favored with a motion from an appellee. Thus, we believe it is well within this court's discretionary power to dismiss Thomas's appeal sua sponte.

CONCLUSION

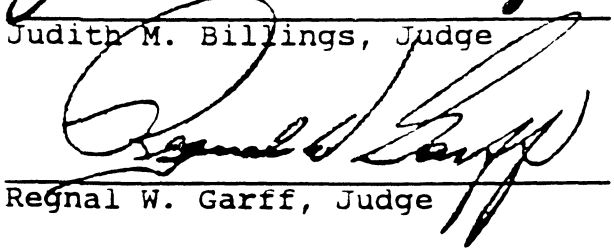
Thomas's long-standing failure to comply with the trial court's order and his present inability to do so require this court to dismiss his appeal. We find no merit in his claims that the contempt order was issued in a separate action or that his

incarceration somehow precludes this court from dismissing his appeal. Therefore, the instant appeal is dismissed.

Gregory K. Orme, Judge

WE CONCUR:

Judith M. Billings, Judge



Regnal W. Garff, Judge

COVER SHEET

CASE TITLE:

Richard W. Von Hake, Trustee of
the Von Hake 1987 Trust,
Plaintiff and Appellee,
v. Case No. 920643-CA
Harry Edward Thomas,
Defendant and Appellant.

August 10, 1993. OPINION (For Publication).

Opinion of the Court by GREGORY K. ORME, Judge; JUDITH M. BILLINGS, and REGNAL W. GARFF, Judges, concur.

CERTIFICATE OF MAILING

I hereby certify that on the 10th day of August, 1993, a true and correct copy of the foregoing OPINION was deposited in the United States mail to the parties listed below:

Shawn D. Turner (Argued)
Brown, Larsen, Jenkins & Halliday
Attorneys at Law for Appellant
660 South 200 East, Suite 301
Salt Lake City, UT 84111

H. Ralph Klemm (Argued)
Attorney at Law for Appellee
349 South 200 East, #560
Salt Lake City, UT 84111

and a true and correct copy of the foregoing OPINION was deposited in the United States mail to the district court judge listed below:

The Honorable Don V. Tibbs
Sixth District Court
Sanpete County Courthouse
Manti, UT 84642

Caroline Workman
Judicial Secretary

TRIAL COURT:

Sixth District, Kane County #D-1306-CV2540

ADDENDUM "B"

IN THE SUPREME COURT

STATE OF UTAH

332 STATE CAPITOL

SALT LAKE CITY, UTAH 84114

December 1, 1993

OFFICE OF THE CLERK

Shawn D. Turner
BROWN, LARSEN, JENKINS & HALLIDAY
660 South 200 East, Suite 301
Salt Lake City, UT 84111

Richard W. Von Hake, Trustee
of the Von Hake 1987 Trust,
Plaintiff and Respondent,
v.
Harry Edward Thomas, aka Ed
Thomas,
Defendant and Petitioner.

No. 930457
920643-CA
D13060CV2540

MINUTE ENTRY

Petitioner Thomas' petition for writ of certiorari is granted on the issue that he was unable to brief the issue of why his appeal should not be dismissed. On that limited issue, the case is remanded to the court of appeals with instructions to allow parties to brief the issue why the appeal should not be dismissed.

Not further briefing before this court is required, and the court of appeals' decision is affirmed in all other respects.

Geoffrey J. Butler
Clerk

ADDENDUM "C"

IN THE UTAH COURT OF APPEALS

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Richard W. Von Hake, Trustee of the Von Hake 1987 Trust,	ORDER
Plaintiff and Respondent,	Case No. 920643-CA
v.	
Harry Edward Thomas, aka Ed Thomas,	
Defendant and Petitioner.	

The Court of Appeals entered an opinion herein on 10 August 1993. Thereafter, Petitioner filed a petition for writ of certiorari in the Utah Supreme Court.

By unpublished minute entry dated 2 December 1993, the Supreme Court granted the petition and remanded the matter to the Court of Appeals as follows:

> Petitioner Thomas's petition for writ of certiorari is granted on the issue that he was unable to brief the issue of why his appeal should not be dismissed. On that limited issue, the case is remanded to the court of appeals with instructions to allow parties to brief the issue why the appeal should not be dismissed.

The order went on to state that "the court of appeals' decision is affirmed in all other respects."

As we view the Supreme Court's order, the following aspects of this court's decision, inter alia, have been affirmed:

1. Defendant is in contempt of the district court and had adequate notice of the Supreme Court's affirmance of the criminal contempt judgment against him;

2. D'Aston v. D'Aston, 790 P.2d 590 (Utah App. 1990), correctly states the law, namely, that one who is in contempt of a trial court may have his appeal dismissed, at least if such contempt is not purged, or

the trial court is not otherwise satisfied, within thirty days;

3. Defendant's contempt is properly of issue in the instant appeal, either because the judgment renewal proceeding represents a continuation of the initial proceeding or because it is collateral to the original action.

Accordingly, the only issue before the court on remand and to be briefed by the parties is whether dismissal of the appeal is an appropriate sanction under all the circumstances. In that regard, the parties shall address the following sub-issues:

1. Whether D'Aston actually requires a 30-day grace period for contumacious litigants or whether it merely permits such a grace period, in the discretion of the appellate court;

2. If a 30-day grace period is otherwise required, whether it may be dispensed with in situations where it is physically impossible for defendant to bring himself into timely compliance with the trial court's orders and process, including in the situation of defendant's incarceration out of state;

3. If incarceration out of state might in some instances preclude dismissal and require instead a grace period longer than 30 days, whether the result should be different in cases where defendant had ample opportunity, pre-incarceration, to discharge the contempt sanction pending against him.

Appellant shall file his brief within thirty days of the date hereof. Appellee shall thereafter have 30 days to file a responsive brief. Appellant's reply brief, if any, shall be filed within thirty days of the date of appellee's brief. All briefs shall be limited to the issues outlined and described herein.

Dated this 7th day of January, 1994.

BY THE COURT:

Gregory K. Orme, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 7th day of January, 1994, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

Shawn D. Turner
Brown, Larsen, Jenkins & Halliday
Attorneys at Law
660 South 200 East, Suite 301
Salt Lake City, UT 84111

H. Ralph Klemm
Attorney at Law
349 South 200 East, #560
Salt Lake City, UT 84111

Dated this 7th day of January, 1994.

By _____
Deputy Clerk

ADDENDUM "D"

DETERMINITIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Const. Art. I Sec. 9

Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.

Utah Const. Art. VIII Sec. 5

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provied by statute. Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.